

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF KUALA LUMPUR
APPEAL NO. WA-12BNCvC-34-05/2021**

Between

BALAKRISHNAN A/L SAMYKANNU ... Appellant

And

SIME DARBY PLANTATION BERHAD ... Respondent

**IN THE SESSIONS COURT OF KUALA LUMPUR
SUIT NO. WA-B52NCvC-43-01/2020**

Between

BALAKRISHNAN A/L SAMYKANNU ... Plaintiff

And

SIME DARBY PLANTATION BERHAD ... Defendant

GROUND OF DECISION

Introduction

1. This is the Appellant's appeal against the decision of the learned Sessions Court Judge ("SCJ") after a full trial. The SCJ had dismissed the Appellant's claim and allowed the Respondent's counterclaim.

2. I dismissed the appeal. Here are the grounds of my decision. The parties shall be referred to as they were in the court below. Where the Appellant was the Plaintiff ("P") and the Respondent was the Defendant ("D").

Background facts

3. P was employed by D from 1.4.1981 until 31.8.2019. The last role assumed by P was Assistant Estate Manager. He was last stationed at Belian Estate located at Sarawak, Malaysia.
4. Around October 2018 until January 2019, P underwent treatment at West Malaysia for health issues such as inter alia kidney issue. Throughout the aforementioned period, P had taken medical leave.
5. Eventually, D invited P to attend a discussion with its representatives on 20.8.2019. The purpose of the meeting was to explain a Mutual Separation scheme (“**Mutual Separation**”) offered by D to P. The representatives from D (“**Representatives**”) who attended the discussion were:
 - (a) Megat Kamil Azmin bin Megat Rus Kamarani – Head of Human Resources for Upstream Malaysia (“**SD1**”);
 - (b) Marzulkifli bin Mohamed – Estate Manager of the Respondent (“**SD2**”); and
 - (c) Nurul Shakila binti Norizad – Assistant Human Resources Executive of Upstream Malaysia (“**SD3**”).
6. Under the Mutual Separation, D offered P a sum of RM115,584. Which is approximately 9 months last drawn salary and 3 months salary in lieu of notice. The Representatives had informed P to bring home a copy of the Mutual Separation containing the relevant terms and conditions and to consider the offer made.

7. On 26.8.2019, P signed the Mutual Separation. It was agreed that the RM115,584 compensation sum will be released to P on his last salary date, which is on 31.8.2019. But subject to receipt of the income tax exemption/clearance from the Inland Revenue Board by D.

8. At the material time, D had assisted P in making an insurance claim to Lockton Insurance & Co. (“**Insurance Company**”). A response from the Insurance Company regarding P’s insurance claim was pending.

9. At the material time, D was still awaiting the income tax exemption letter from P. Which is a pre-requisite to releasing the compensation under the Mutual Separation. Such letter was only received on 10.1.2020 from P’s solicitors, which for the very first time, mentioned the claim for an additional sum of RM400,000.

10. In January 2020, P filed a suit against D at the Sessions Court. P prayed for the following relief:

- (a) general damages arising from D’s breach of the Mutual Separation;
- (b) special damages for the sum of RM115,584 arising from D’s breach of the Mutual Separation;
- (c) a declaration that D owes P a sum of RM400,000;
- (d) an order for D to pay the said RM400,000 to P;
- (e) general damages arising from D’s breach of a collateral contract;
- (f) aggravated damages arising from D’s conduct as pleaded in the Statement of Claim;
- (g) further and alternatively:

- (i) for a nullity of the Mutual Separation arising from fraudulent misrepresentation by repositioning the parties as if the Mutual Separation had not been entered into;
- (ii) damages for fraudulent misrepresentation;
- (iii) special damages for the sum of RM269,696 as a reasonable salary that would have been received by P, in the event that he was not led to sign the Mutual Separation; and
- (iv) aggravated damages arising from D's conduct as pleaded in the Statement of Claim.

Sessions Court proceedings

11. The premise of P's claim against D in the Sessions Court can be summarized as follows:

- (a) whether there exists a collateral contract between P and D regarding an additional sum of RM400,000 that is allegedly to be paid to P in the event he accepts the Mutual Separation. If yes, whether D had breached this collateral contract and P is entitled to the said sum of RM400,000 from D (**"First Issue"**);
- (b) whether there is fraudulent misrepresentation by D which induced P into signing the Mutual Separation. If yes, whether P is entitled to the reliefs pleaded in paragraph 40(g) of the Statement of Claim (**"Second Issue"**); and
- (c) whether D had breached the Mutual Separation and P is entitled to the sum of RM115,584 and any other damages from D (**"Third Issue"**).

12. By way of counterclaim, D brought an action against P for breaching the terms of the Mutual Separation. The reliefs sought by D in its counterclaim are:

- (a) a declaration that P had breached the terms of the Mutual Separation and as a result, is not entitled to claim for the RM115,584 compensation sum; and

- (b) general damages, exemplary damages and aggravated damages for P's breach of the Mutual Separation.

13. At the trial, P called 1 witness i.e. P himself. D called 3 witnesses i.e. the Representatives. The SCJ held that P had failed to prove the following on the balance of probabilities:

- (a) regarding the First Issue, that there exists a collateral/oral contract between P and D;
- (b) regarding the Second Issue, that D had fraudulently misrepresented to P which led him to sign the Mutual Separation; and
- (c) regarding the Third Issue, that D had breached the Mutual Separation.

14. The SCJ also allowed D's counterclaim for a declaration that P had breached the Mutual Separation and is not entitled to the RM115,584 compensation sum.

Grounds of Appeal

15. P's appeal against the SCJ's decision is premised on the grounds the SCJ had erred in law and/or in fact for failing to consider:

- (a) that there is a collateral contract or oral agreement between P and D regarding an additional sum of RM400,000 which will be received by P if he accepts the Mutual Separation proposed during the meeting held on 20.8.2019 and/or 26.8.2019 ("**1st Ground of Appeal**");
- (b) that D had breached the oral collateral contract between P and D ("**2nd Ground of Appeal**");
- (c) that there is fraudulent misrepresentation by D which induced P into signing the Mutual Separation considering that the RM115,584 compensation sum did not exceed the sum to be received by P if he continues working with D until his retirement ("**3rd Ground of Appeal**");

- (d) that P is entitled to receive the RM115,584 compensation sum from D as per the terms of the Mutual Separation (“**4th Ground of Appeal**”);
- (e) that D had breached the terms of the Mutual Separation when D refused payment through the collateral/oral contract and the Mutual Separation (“**5th Ground of Appeal**”); and
- (f) that P did not breach any of the terms or conditions of the Mutual Separation and is entitled to claim for the sum stated in the Mutual Separation (“**6th Ground of Appeal**”).

Law on Appeal

16. It is trite law that an appellate court will not generally intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. The determining factor of the ‘plainly wrong’ test is premised on whether there had been no or insufficient judicial appreciation of evidence by the trial court.

17. In *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased* [2020] 12 MLJ 67 at 89, the Federal Court said:

“[62] The Malaysian position has always been that, a decision that is arrived at, due to a lack of judicial appreciation of evidence is plainly wrong. The Federal Court case of Gan Yook Chin & Anor v Lee Ing Chin & Anor (supra) call for consideration as to what constitutes as the “plainly wrong” test.”

18. In *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 at 800, the Federal Court said:

“[26] Thus, the prime issue in respect of Questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly

wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence."

19. In *Azman bin Mahmood & Anor v SJ Securities Sdn Bhd* [2012] 6 MLJ 1 at 12, the Federal Court said:

"[25] The law on appellate intervention on findings of fact by a trial Judge is trite. In this context it may be useful to refer to the case of *Multar v Lim Kim Chet and Anor* [1982] 1 MLJ 184; [1982] CLJ 107 (FC), wherein it was held that an appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence" - and the consistency of the other party's evidence being disregarded. In the Privy Council case of *Choo Kok Beng v Choo Kok Hoe and Ors* [1984] 2 MLJ 165 it was held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice."

20. In *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2015] MLJU 1282, the Court of Appeal said (at page 4 of 15):

"[15] ... the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. ... In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

[16] There is, however, little room for variation in the application of the principle of intervention when the trial judge is plainly wrong. Appellant courts ought to be consistent in ensuring that appellate intervention only comes about when a trial judge reaches a conclusion which no reasonable judge could have reached. A lack of such consistency in approach would give rise to considerable uncertainty in the practice and progress of litigation."

21. P has failed to satisfy the legal threshold which warrants appellate intervention. In my opinion, the SCJ is not plainly wrong. She had given sufficient judicial appreciation towards the evidence and testimonies adduced during trial. Thus, I considered appellate intervention to be unwarranted. My reasons are as follows.

1st and 2nd Grounds of Appeal

22. The 1st and 2nd Grounds of Appeal are in relation to the issue of the alleged collateral/oral contract. I find that the SCJ had properly considered the evidence adduced in deciding that such collateral/oral contract does not exist. Specifically, the SCJ based her conclusion on the following:

- (a) P had failed to explain the evidence showing that there was a written proposal from the Representatives regarding payment of an additional sum that was formed from an oral contract (as averred by P);
- (b) there were no documentary evidence to support P's allegations regarding the additional sum of RM400,000;
- (c) on the contrary, the WhatsApp message showed that P had made a follow-up regarding the status of his insurance claim that was yet to be approved by the Insurance Company (which was unrelated to the Mutual Separation);
- (d) P had failed to explain how the sum of RM400,000 was calculated to be paid to P or how parties purportedly arrived and agreed to such figure; and
- (e) if P did not agree to the formula or amount that was offered, he could have refused the offer made in the Mutual Separation and continue his employment with D.

23. P, in his attempt to prove the existence of a collateral/oral contract, had relied on a WhatsApp message from himself to SD3 which states:

"Good Morning pn
pl check with insurance co.

because i neef to spent for
Medical and dialysis.
Tq.”

24. This Whatsapp message is the sole ‘evidence’ relied on by P to prove the existence of a collateral/oral contract. No other documentary evidence was tendered in an attempt to prove the same. This was confirmed by P during cross-examination:

“Q: Ok. Mr Bala, can you confirm to Puan Hakim that this is the **WhatsApp message that you state is the evidence**. Right?

A: Yes.

Q: **Apart from this evidence, do you have any other written evidence that you have actually asked about the RM400,000?**

A: **No, only this.** This one I ask –

Q: Only this one. Mr Bala, my question is just that is there any other evidence or this one only?

A: No, only this.

Q: Only this one. Is there 1 any documentary evidence or WhatsApp message from Shakila, Megat or even Marzulkifli telling you that we will pay you the RM400,000? Is there anything there in the Court today?

A: No. Only this one.

Q: Only this one?

A: This one only.

Q: Ok, so we just need to zoom in to this one.

A: Yes, only this one.”

25. The WhatsApp message had only made reference to P’s insurance claim made to the Insurance Company. There was no mention of the sum of RM400,000 (which is allegedly the sum payable by D to P as a result of him signing the Mutual Separation).

26. In fact, it was understood by SD3 that the WhatsApp message served as a follow-up on P’s insurance claim, which was submitted by D on behalf of P to the Insurance Company. This was confirmed in her testimony during cross-examination and re-examination.

During Cross-Examination

"Q: Dan saya cadangkan ini bukannya persoalan perihal perks and benefits, tetapi Plaintiff bertanya perihal bayaran tambahan atau big amount of RM400,000 yang telah dijanjikan kepada Plaintiff. Setuju atau tidak?

A: Saya tidak setuju"

During Re-Examination

"Q: Ok Puan, sila rujuk kepada muka surat 127, Ikatan B, yang tadi dirujuk oleh rakan bijaksana saya, the WhatsApp message. Tadi rakan bijaksana saya tanya melalui WhatsApp ini, Plaintiff telah bertanya berkenaan jumlah tambahan yang dijanji semasa perbincangan 20 Ogos dan 26 Ogos. Puan telah jawab 'tidak setuju'. Boleh Puan jelaskan apakah persefahaman Puan mengenai mesej ini?

A: Ok kalau rujuk pada WhatsApp message ini, sebab dia cakap insurance follow-up dan memang saya sendiri tahu, saya berurusan dengan dia selain daripada MSS adalah saya bantu untuk claim insurance, so ... yes, pemahaman saya memang, memang dia follow-up on dia punya group critical illness insurance."

27. Contrary to P's bare assertion which lack documentary evidence, SD3's testimony in court that the WhatsApp message was a follow-up on the insurance claim can be supported by evidence that was duly filed and tendered in the Sessions Court.

28. P contends that the SCJ had failed to consider the entirety of the events and had only considered the WhatsApp message when deciding that there is no collateral/oral contract between P and D. However, in her Grounds of Judgment, the SCJ had considered the following:

"Selain itu juga kegagalan Plaintiff menjelaskan bagaimana RM400,000.00 dihitung untuk dibayar kepada Plaintiff telah memudaratkan tuntutan Plaintiff dalam kes ini."

29. It is clear from the above that the SCJ's consideration was not merely the lack of documentary evidence but rather, P's failure to explain how the sum of RM400,000 was calculated as P alleges that such sum was

promised to be paid to him. It is undisputed that P had accepted the Mutual Separation and nowhere in the document was there any additional sum of RM400,000 mentioned or promised.

30. P then departed from his pleadings and tried to claim that the additional sum of RM400,000 is inclusive of the insurance claim.

“Q: So, you are telling her, please check with the insurance company because I still need to pay for dialysis and treatment. If they have already agreed to pay you RM400,000 why didn’t you just say because you agreed to pay me RM400,000. Please check with insurance company because you agreed to pay me. Why are you saying now that please check with insurance company because I still need to pay for dialysis and treatment? Why didn’t you just write there, because you agreed. You setujulah, you setuju bayar saya. Why don’t you just write there, because you agree?

A: But I my message –

Q: Mr Bala.

A: My message RM400,000 is in the insurance money means instead of RM400,000 together.

Q: Mr Bala, I’ve moved on from that point. I have actually went on to the second sentence now.

A: But I know from the message.”

31. However, nowhere in the pleadings did P mention that the additional sum of RM400,000 comprises of his insurance claim as well. It is trite law that parties are bound by their pleadings.

32. The Federal Court case of *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292 at 305 affirmed this well-established principle:

“[27] ***It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded:*** Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, State Government of Perak v Muniandy [1986] 1 MLJ 490, Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd

[2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 it was held that **where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal.** A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152. In *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.”

33. In the circumstances, I do not accept P's assertion that the RM400,000 additional sum is inclusive of his insurance claim. P was given the opportunity during cross-examination to explain how the purported sum of RM400,000 was calculated. However, he failed to do so.

“Q: So, when you say that Pn Shakila promised RM400,000 to you, how did she count?

A: Yes.

Q: I want to know the formula. Just the formula.

A: How you want to get, because I don't know, because why, they say they take from another account there, another account there, then some part from the insurance, so I know how to get money.

Q: Let me try to understand. They take some part from this account, some part from that account.

A: Under the account, because normally Sime Darby got costing accounts very practise.

Q: Costing accounts im-practice?

A: I mean, when they no money for this account, we take from another account. Normally it's practise in state.”

34. P claimed that compensation as per the Mutual Separation was around 1.5 to 2 months salaries worth for each year of service with D. However, the evidence indicates that there is no standard formula that must be used by D when coming up with the Mutual Separation. SD1 testified that the compensation given differs from one individual to

another, depending on the type and category of employee that the scheme is offered to.

During Cross-Examination

“Q: Juga dikatakan bahawa MSS, sebarang formula untuk MSS adalah berlainan dari formula pengiraan untuk VSS. Itu betul?

A: Betul.

Q: Dan MSS tidak semestinya bergantung kepada formula. Ia juga boleh bergantung kepada mutual discussion di antara pihak-pihak. Betul?

A: Betul.”

During Re-Examination

“Q: En Megat, boleh senaraikan nama-nama individu yang telah ditawarkan MSS bersama dengan pihak Plaintiff? The same batch.

A: The same batch? Termasuk Plaintiff, ok, kami juga menawarkan MSS kepada empat orang, iaitu, Tn Hj Mazlan Abdullah, Harun Idris, Che Rahmah dan juga Mohamad Nasir Che Kob. Kesemuanya kami menawarkan MSS berdasarkan formula yang sama.

...

Q: Tadi En Megat katakan formula yang sama. Boleh terangkan kepada Mahkamah apakah formula yang sama yang di, yang baru dikatakan?

A: Ya. Formula yang kami gunakan bersamaan dengan prolonged illnesses formula di mana kandungannya adalah enam bulan gaji penuh dan seterusnya enam bulan gaji separuh. Jadi secara keseluruhannya sembilan bulan.

A: Adakah formula ini terkandung di dalam mana-mana dokumen di hadapan Mahkamah hari ini?

Q: Formula itu, ataupun jumlah itu terkandung di dalam surat tawaran MSS dan saya sewaktu sesi bersama, di mana saya take the lead in terms of perbincangan itu, saya ada menerangkan bagaimana jumlah itu ditentukan”

35. Regardless of how the compensation was calculated and whether a standard formula was adopted by D when offering the Mutual Separation, P was at liberty to refuse the compensation offered and continue with his employment with D.

36. The burden lies on P to prove that there is a collateral/oral contract regarding an additional sum of RM400,000 that was allegedly promised to

him, which he has failed to discharge. Given:- (a) the absence of documentary evidence pertaining to the same, (b) P's failure to explain how the sum of RM400,000 came about and (c) the consistent testimonies of the Representatives who testified against such purported collateral/oral contract, I find that there is no such collateral/oral contract. Since such contract is non-existent, there can be no breach of the same by D (as alleged by P).

37. The SCJ had rightly decided that there was no collateral/oral contract between P and D regarding an additional sum of RM400,000.

3rd Ground of Appeal

38. The 3rd Ground of Appeal is that the SCJ had erred in law or in fact for failing to consider that there is fraudulent misrepresentation by D which induced P into signing the Mutual Separation considering that the sum offered, i.e. RM115,584 did not exceed the sum to be received by P if he continues working with D until his retirement.

39. I find that the SCJ is not guilty of no or insufficient judicial appreciation of the evidence provided by both parties. Her conclusion was based on the following:

- (a) the Representatives had given consistent testimonies that there was no additional offer given by D to P that led P to agree to accept the Mutual Separation;
- (b) the Representatives do not have any personal interest in this matter;
- (c) the presence of the Representatives did not give pressure to P;
- (d) P was given 6 days to consider the compensation offered by D;

- (e) the contents of the Mutual Separation was explained to P; and
- (f) P was given the opportunity to continue his employment with D should he reject the terms and conditions of the Mutual Separation.

40. When asked by counsel for P whether an additional sum was offered to P, each of the Representatives gave consistent answers.

SD1

- “Q: I put it to you, Tuan or the other representatives said to the Plaintiff, ‘this amount in the document, this RM115,000 is a small amount but a big amount is coming to you.’
- A: Saya tidak setuju.
- Q: Tidak setuju. It was also said, ‘A big amount of RM400,000 is coming to you but you must sign the MSS.’
- A: Saya tidak setuju.”

SD2

- “Q: Ok. Wakil syarikat pada hari itu telah berkata kepada Plaintiff. ‘This is a small amount, a big amount is coming to you later’, betul tak?
- A: Tidak betul.
- Q: Turut dikatakan ‘A big amount of RM400,000 is coming but you must sign the MSS’, betul ke tak?
- A: Tidak betul.”

SD3

- “Q: Tak ingat? Saya cadangkan bahawa wakil syarikat telah berkata kepada Plaintiff perihal RM115,000 dalam dokumen MSS itu, dia kata ‘This is a small amount. You don’t worry, a big amount is coming to you.’. Ya, tidak atau tak boleh ingat?
- A: Tidak, tidak setuju.
- Q: Tidak setuju. Turut dikatakan bahawa ... kepada Plaintiff wakil syarikat telah berkata kepada Plaintiff ‘You will get a big amount of RM400,000 but you must sign the MSS’, setuju tak?
- A: Tidak setuju.”

41. It is implausible for the additional sum of RM400,000 to be offered to P as the Representatives will not gain any benefit nor do they have any personal interest in offering such amount of money to P. One of the

witnesses, SD2 was only doing his attachment at the time and had joined the discussion as a form of ‘exposure’ for himself. Hence, there is no reason for his testimony to be doubted.

“Q: Tadi rakan bijaksana saya juga bertanya kenapa ada tiga orang hadir untuk berbincang dengan Plaintiff kalau it’s a take it or leave it exercise. En Marzuk telah jawab Megat is there to lead, Shakila teman Megat, as for you, En Marzuk telah cakap attachment programme, ‘exposure kepada saya’, boleh jelaskan sedikit ‘exposure kepada saya’ maksudnya apa, ya?

A: Saya adalah pengurus ladang yang diletakkan di dalam satu program di Sime Darby dipanggil Sime Darby Attachment Programme untuk expose kepada beberapa department, iaitu bahagian Human Resource, bahagian GIGA, di mana audit dan compliance dan bahagian plantation upstream and monitoring. So pada ketika itu, saya attached di bahagian HR dan oleh kerana ada sesi MSS, saya menawarkan diri untuk berada sebagai exposure kepada saya.”

42. In fact, the additional sum would only benefit P, as he is the only person who has a personal stake in the matter.

“A: No, you see. You see the Kelida what must I do at Kelida. Right? You make me like that, I was a manager, they pay me special allowance all that, on 26th of June you said, ‘Your letter of promotion is coming.’ 28th say, ‘Still your letter is coming.’ 29th say, ‘Better vacate the bungalow’.

Q: You are –

A: You know how you feel? What face I put to work there? You tell me?

Q: So there is no face. It’s a matter of ego that you don’t want to go back to work in Sarawak.

A: Come on. I’m not robot, you know? I’m human being. I’m not robot, you switch on air-cond this one. I human being, I got feelings, you know?

Q: Correct.

A: That’s why I said, I told Mr Andrew, I cannot work here, I cannot because my mind all jam. I said transfer me to Semenanjung, I already start my programme. I still can do my work.”

43. By accepting the Mutual Separation, P need not return to Sarawak and be separated from his wife. This has made her unhappy in the past.

“A: You know we go there, **I separated my wife**. Because work, you know?

- ...
- A: Because she say every time work, work, work. I said I want to be like that, like that, like that. I don't want to die no ordinary man.
- ...
- A: No. So worry, you know? How much, you know? **Every time my wife don't talk to me.** You see you young time you work, work, work, work. Now old age, you got money you sakit. How you feel? Now I still separated I don't see my family."

44. By accepting the Mutual Separation, P is able to continue receiving dialysis treatment at his regular hospital at SJMC in West Malaysia.

- "Q: So Mr Bala, just now you said that you **started dialysis in October 2018.**
- A: October 18, end of the month.
- Q: Yes, correct. It is **Semenanjung SJMC** right?
- A: Yes.
- Q: At that time you were still supposed to carry out work in Sarawak, correct?
- ...
- Q: You were supposed to base and work in Sarawak.
- A: Sarawak.
- ...
- Q: Ok. Then since you started the treatment here and you said you have to go to the hospital every three times a week, so I take it that you **have been in Semenanjung since October 2018 all the way until MSS in 2019, August.** Correct?
- A: Yes.
- Q: That's not disputed.
- A: Yes."

45. Despite the medical leave taken by him from October 2018 until August 2019, P was still given his monthly salary by D. However, P knew that it was not logical for D to continue paying his monthly salary in view of his long medical leave and his inability to continue his work at Sarawak.

- "Q: Mr Bala, when you were receiving treatment in Semenanjung, not in Sarawak, all the way up until August 2019, Sime Darby was still paying you salary, correct?
- A: Yes.
- Q: Although you are not in Sarawak working.

A: Yes, Pay me.

...

A: How to work? You tell me. I cannot work in Sarawak.

Q: Would you still expect salary continue forthcoming from Sime Darby if you are on long medical leave and transfer has not been approved? Would you still have the expectation, that salary?

A: But it's not logic lah."

46. The above circumstances refute P's submission that his actions did not reflect one that would have signed the Mutual Separation. Clearly, the one who would benefit from the Mutual Separation is P, and not D.

47. Furthermore, P is estopped from claiming that he did not understand the terms and conditions of the Mutual Separation or make claims regarding any additional payment to be made to him. In accordance with legal principles that have been established in the cases cited below, P who has signed the Mutual Separation is estopped from disputing that he does not understand or that he is not bound to the terms of the signed Mutual Separation.

48. In *Yatin bin Mahmood v Mohd Madzhar bin Sapuan & Ors* [2010] 8 MLJ 647 at 655, the High Court said:

"The general rule is that a man is estopped by his deed, and although there is no such estoppel in the case of ordinary signed documents, a person of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not."

49. In *AWC Bhd (formerly known as AWC Facility Solutions Bhd) v Point-Euro Malaysia Sdn Bhd & Ors* [2012] MLJU 474, the High Court said (at page 5-6 of 11):

"[27] Cases where non est factum as a defence has been accepted are few and far in between and indeed have become more rare as society becomes

more literate. In *Gallie v Lee* [1969] 2 WLR 901, Lord Denning observed with plain perspicuity at page 913 after a brilliant discussion of the various case law as follows:

'After all this long discussion, I would endeavour to state this principle. It seems to me to be this: whenever a man of full age and understanding, who can read and write, signs a legal document which is put before him for signature, by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences - then, if he does not take the trouble to read it but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented, to all those into whose hands it may come, that it is his document; and once they act upon a being his document, he cannot go back on it and say it was a nullity from the beginning.'

...
[30] Applying the above principle to the facts of the case, Lord Denning with clarity continued at pages 913-914 as follows:

'I propose, therefore, to apply the principle which I have stated. In consonance with it, I am quite clear that Mrs Gallie cannot in this case say that the deed of assignment was not her deed. She signed it without reading it, relying on the assurance of Lee that it was a gift to Wally. It turned out to be a deed of assignment to Lee. But it was obviously a legal document. She signed it: and the building society advanced money on the faith of it being her document. She cannot now be allowed to disavow her signature ...'

50. The discussion between P and the Representatives took place on 20.6.2019. P signed the Mutual Separation with no objections or conditions on 26.8.2019. P had 6 days to consider the offer made to him, and his decision was to sign the Mutual Separation.

51. Moreover, SD1 had explained the offer to P during the meeting of 20.6.2019.

"Q: Preference company ialah nak Mr Bala accept the MSS dan bukannya reject. Puan telah jawab, 'Saya tidak setuju'. Boleh Puan jelaskan kenapa Puan tidak setuju dengan cadangan rakan bijaksana saya?

A: Saya memang tidak setuju kerana di dalam surat itu sendiri ada mengatakan bahawa terima ataupun, terima MSS ataupun reject so kami

pada session 20hb itu yang saya ingat En Megat memang menjelaskan satu-satu terms di dalam surat. So saya tak setuju yang, yang mengatakan kami betul-betul nak menggalakkan dia terima MSS."

52. P had ample time to read and understand the terms and conditions of the Mutual Separation. If he had any qualms regarding the terms and conditions or choose to refuse the offer, P had every opportunity to do so and continue his employment with D. However, instead of rejecting the compensation offered in the Mutual Separation, P chose to sign it. His actions to claim an additional sum of RM400,000 on the basis that there was a collateral/oral contract is a mere afterthought.

53. P failed to establish that he has been fraudulently misrepresented considering the time given to him to consider the Mutual Separation and its terms and conditions. I find that the SCJ had appreciated the evidence before her and rightfully dismissed P's claims on the Second Issue.

4th, 5th and 6th Grounds of Appeal

54. The 4th, 5th and 6th Grounds of Appeal are in relation to the issue of P's entitlement to the sum provided in the Mutual Separation, and that D had breached the terms of the same. The SCJ in dismissing the Third Issue had decided that P was in breach of the Mutual Separation and thus, is not entitled to the RM115,584 compensation sum.

55. In so deciding, the SCJ considered clauses 5 and 9 of the Mutual Separation.

Clause 5

"5. ... This **agreement for mutual separation can be revoked by the Company** at any time **in the event you breach** your express and/or implied

terms and conditions of employment or **any of the terms** herein. In such event, **you will not be entitled to the said payment** or any part thereof and the Company is entitled to recover any payment made to you.”

Clause 9

- “9. In consideration of the said payment, you agree and declare that:
- (a) You will release the Company / Sime Darby Plantation Group from all claims, actions, proceedings, demands of any nature, that you may now or hereafter have, against the Company / Sime Darby Plantation Group arising out of and/or in connection with your employment or cessation of employment with the Company; and
 - (b) You will fully indemnify and hold the Company / Sime Darby Plantation Group harmless from any loss, expense, damage or liability in connection with any claim, right, demand and/or cause of action made by you or your agents under any legislation/laws.”

56. Clause 4 of the Mutual Separation is relevant in establishing that D had not breached the terms of the Mutual Separation.

Clause 4

“4. The said payment will be released to you ... after the last day of employment, subject to the Company’s receipt of income tax exemption/clearance from the Inland Revenue Board Malaysia.”

57. It cannot be disputed that an “*income tax exemption/clearance*” is a prerequisite for the release of the RM115,584 compensation sum. The said letter was only given to D through P’s solicitors on 10.1.2020, and was attached to P’s demand for the sum of RM400,000.

58. P’s letter demanding an additional sum of RM400,000 amounted to a breach of the Mutual Separation, in particular clause 9 thereof. Apart from the said letter of demand, P had also commenced proceedings in the Sessions Court, which led to this appeal.

59. In the circumstances, P breached the Mutual Separation when he commenced legal action against D. As a consequence, P is no longer

entitled to the RM115,584 compensation sum as per clause 5 of the Mutual Separation.

60. I find that D is not in breach of the Mutual Separation for not paying the RM115,584 compensation sum to P. This is because the “*income tax exemption/clearance*” letter was only given to D on the day the letter of demand was served on them. The position taken by D is consistent with clause 4 of the Mutual Separation.

61. Hence, the SCJ did not err in dismissing P’s claim under the Third Issue.

Section 29 of the Contracts Act 1950

62. In submissions, P argued that clause 9 of the Mutual Separation (“**Clause 9**”) is void for contravening section 29 of the Contracts Act 1950. And that the existence of Clause 9 infringes on P’s fundamental right to access justice.

63. Section 29 of the Contracts Act 1950 reads:

*“29 Agreements in restraint of legal proceedings void
Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.”*

64. Firstly, this point was not stipulated in the Memorandum of Appeal. P’s failure to specify this purported error of law or fact, in my view, precludes him from raising the same at this appeal.

65. Secondly and in any event, this challenge against the validity or enforceability of Clause 9 is unsustainable. It is not the case that P is absolutely barred from commencing a legal suit against D. But rather, the RM115,584 compensation sum need not be paid to P due to his breach of Clause 9. This can be seen from the express wordings of both clause 5 of the Mutual Separation and Clause 9.

66. I agree with D that legal provisions akin to or which bear similar effect, meanings and interpretations to Clause 9 is commonly found in legal agreements, in particular settlement agreement(s). These legal provisions are typically labelled as ‘release’ or ‘waiver’ of one’s right in legally enforceable agreements. Clause 9 is similar to such ‘release’ or ‘waiver’ provisions. It was agreed to by P when he signed the Mutual Separation. It is therefore enforceable by law.

67. In *Ng Wei Jye v Kaspersky Lab Sea Sdn Bhd* [2020] ILJU 148, it was held that when an employee receives a Voluntary Separation Scheme (a separate and independent contract for the purpose of mutually ending an employment contract) and sign a full and final settlement, such employee cannot claim for other benefits.

[25] In Zainon Ahmad v Padiberas Nasional Berhad [FC] [2012] 3 MELR 223 the Federal Court decided that the rights arising upon the termination of an employment contract are extinguished pursuant to a termination through VSS (Voluntary Separation Scheme) despite the absence of an express provision to that effect. The Federal Court further explained that a VSS is “... a separate and independent contract intended to mutually override and terminate an existing contract of employment” and further states as follows:

“It is our view that under VSS the employees have the option to accept the said scheme or continue to work as before. Therefore, once the said option has been exercised by the employees, the question of it being unfair does not arise. To us an employee who on his own will, accepts the benefit of the VSS,

resigns, signs a full and final settlement and walks away cannot then turn around and ask for any other benefits.”

68. P was well aware of the contents of the Mutual Separation and the existence of Clause 9. When asked during cross-examination on the existence of such provisions at the time he signed the Mutual Separation and whether Clause 9 was breached by him, P merely denied his knowledge of the same.

“Q: That's why now I read to you Clause 9(a), which you have signed, six days to read, now I'm asking you now, after I read the Clause 9(a), you have made a claim, did you not breach Clause 9(a)? It's a yes or no.

A: I don't know.

Q: Stop looking at your lawyer please. Look at me.

A: I never know all this.

Q: It's ok, Puan. I'll take it up in submission, Puan.

69. Considering the time P had to peruse the Mutual Separation (i.e. 6 days) and that ultimately P had executed the Mutual Separation, P's assertion that he was unaware of it is merely an afterthought.

70. The issue before the SCJ was not whether Clause 9 is void under the Contracts Act 1950 but rather, whether there was a breach of such clause which disentitles P's claim of the RM115,584 compensation sum. It is my finding that the SCJ did not err in deciding that there was indeed a breach of Clause 9 by P.

Memorandum of Appeal

71. Before concluding, I will briefly deal with D's submission that the Memorandum of Appeal is too general. D complains that the

Memorandum of Appeal was drafted in a very wide, vague or general manner.

72. D submits that a memorandum of appeal must specify the points of law or fact which are alleged to be wrongfully decided. This is pursuant to Order 55 rule 4(3) of the Rules of Court 2012 which reads:

“(3) The memorandum of appeal shall be substantially in Form 112 and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively. Notwithstanding rule 8 of this Order, where a supplementary record of appeal is to be filed pursuant to rule 4(2) above, the appellant may if necessary also include in the supplementary record of appeal an amended memorandum of appeal, without leave of the High Court.”

73. D cited the Court of Appeal case of *Bar Malaysia v Neasarani a/p T Singara Thevar* [2015] MLJU 734 which said (at page 2 of 4):

“[5] We also note that the appellant has not specifically raised this issue relating to money lending transaction in the Memorandum of Appeal. It is trite that the strict rules to the Memorandum of Appeal do not permit the appellant to travel out of what has been said in the Memorandum of Appeal. [See Government of the State of Sabah v Syarikat Raspand [2010] 5 MLJ 717; Jaffar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24]. In addition, it is not sufficient to just assert the complaint in a general form without setting out the specifics of the complaint in the Memorandum of Appeal.”

74. And the Court of Appeal case of *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149 at 155 which said:

“[10] The memorandum of appeal must be sufficiently specific to give the respondent a fair opportunity, considering the nature of the ground raised, to address the point, without, on the date of hearing, having to request an adjournment to address it properly. General and vague grounds may be dismissed on objection on that ground.”

75. I find that that the Memorandum of Appeal does set forth the grounds of objection concisely, without argument or narrative, and specifies the points of law or fact which are alleged to have been wrongly decided. It thus satisfies the requirements of Order 55 rule 4(3) of the Rules of Court 2012. The 6 grounds raised are in fact the questions that were considered by the SCJ per her Grounds of Judgement and issues pleaded by P in the pleadings. As such, the Memorandum of Appeal is not too general, but adequately addresses the issues to be considered in this appeal. I therefore rejected D's submission on this point. Moreover, I prefer to deal with this appeal on the merits.

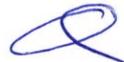
Conclusion

76. In summary, I find that:

- (a) the SCJ did not err in deciding that there was no collateral/oral contract between P and D as regards an additional sum of RM400,000;
- (b) as there was no such collateral/oral contract, D cannot be said to be in breach of the same;
- (c) the SCJ had correctly decided that P was not fraudulently misrepresented to sign the Mutual Separation;
- (d) the SCJ did not err when deciding that P had breached the Mutual Separation as per clauses 5 and 9 thereof;
- (e) due to such breach, P is not entitled to the RM115,584 compensation sum; and
- (f) as per clause 4 of the Mutual Separation, D is not in breach of the same for non-payment of the RM115,584 compensation sum to P.

77. P had failed to demonstrate that the SCJ was plainly wrong in arriving at her decision warranting appellate intervention. As such, I dismissed the appeal. I ordered P to pay costs of RM5,000 to D.

Dated 2 December 2021



Quay Chew Soon
Judicial Commissioner
High Court of Malaya

Counsels

Khirranya Ganesan (*Messrs Gabriel Susayan and Partners*) for the Appellant.
Bailey Leong and Syafinas Ibrahim (*Messrs Zul Rafique & Partners*) for the Respondent.

Cases cited

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Legislation cited

Section 29 of the Contracts Act 1950

Order 55 rule 4(3) of the Rules of Court 2012

